ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

94-108

In the Matter of	)	
	)	
The Petition of the New York Public Service Commission Requesting Authority To Extend Rate Regulation of Communication Mobile Radio Services	)	PR File No. 94-SP6
	)	DA-94-876

COMMENTS OF CONTEL CELLULAR INC. IN OPPOSITION TO PETITION OF PUBLIC SERVICE COMMISSION, STATE OF NEW YORK REQUESTING AUTHORITY TO EXTEND RATE REGULATION OF COMMERCIAL MOBILE RADIO SERVICE PROVIDERS OPERATING WITHIN THE STATE OF NEW YORK

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Contel Cellular Inc. ("CCI"), pursuant to the Federal Communications Commission's ("FCC") decision in Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411 (1994), hereby submits its Comments in Opposition to the Petition of the State of New York Public Service Commission ("NYPSC") Requesting Authority to Extend Rate Regulation of Commercial Mobile Radio Service ("CMRS") Providers Within the State of New York ("Petition"). CCI through partnerships in which they own interests in subsidiaries, manages and operates cellular systems in two MSAs and two RSAs in New York, and is thus directly affected by the NYPSC Petition. For the reasons delineated below, CCI respectfully requests that the NYPSC Petition be dismissed or, in the alternative, denied, for failure to satisfy the demanding standards which the FCC set forth in Section 20.13 of its Rules. 47 C.F.R. § 20.13.

Introduction

The NYPSC has failed to demonstrate a need to continue rate regulation of cellular services in New York under Section 20.13 of the FCC Rules. 47 C.F.R. § 20.13.

Summary

Congress has precluded State regulation of CMRS unless the State can prove that (1) market conditions in the State fail to protect consumers adequately from unjust and unreasonable rates or (2) such service is a replacement for landline service for a substantial portion of landline service within the State. Neither condition has been shown to be present in New York that would warrant a continuation of State rate regulation.

The NYPSC alleges that cellular rates are higher than landline rates and that there is a potential for unjust or discriminatory rates. That is mere speculation and is not a substitute for evidence of actual rate discrimination.

The NYPSC also alleges that cellular carriers are not equal in market share and therefore not competitive. This reasoning is illogical and seems to ignore the realities of a competitive marketplace. In a competitive marketplace, each competitor will seek to achieve a greater marketshare through better service or pricing.

The NYPSC has failed to satisfy the FCC's strict evidentiary requirements needed to continue rate regulation. Therefore because the State's burden of proof has not been met, the Petition should be denied.

Discussion

I. CONGRESS INTENDED FOR THE FEDERAL COMMUNICATIONS COMMISSION TO BE THE SOLE REGULATOR OVER RATES & ENTRY ASSOCIATED WITH THE PROVISION OF COMMERCIAL MOBILE RADIO SERVICES

A. CONGRESS HAS STATUTORILY PREEMPTED STATE REGULATION OF RATES AND ENTRY

In the Omnibus Budget Reconciliation Act of 1993 ("OBR")[1/], Congress determined that regulation of rates and entry into the CMRS market would be most appropriately delegated to the federal government, specifically, to the Federal Communications Commission ("FCC"). Consequently, Congress preempted State regulation of rates and market entry, except in very limited circumstances.

Section 332(c)(3)(A) of the OBR provides, in relevant part:

> Notwithstanding sections 152(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A).

[1/] Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, Title VI, § 6002(b)(2). 107 Stat. 312, 392 (1993) amending Section 3329C) of the Communications Act.

B. CONGRESS GRANTED STATES A VERY LIMITED OPPORTUNITY TO PETITION FOR AUTHORITY TO REGULATE RATES AND ENTRY

The OBR grants States a very limited opportunity to seek authority to continue rate regulation. The OBR erected high hurdles which states must vault to be successful. Specifically, the statute provides:

> [a] State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that -
>
> > (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
> >
> > (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State. . . .

47 U.S.C. § 332(c)(3)(A)(i)-(ii). Furthermore, even with a sufficient evidentiary showing of market failure, a State must have satisfied the following procedural requirement:

> If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. . . .

47 U.S.C. § 332(c)(3)(B).

An FCC grant of State regulatory authority, however, is temporary. After a reasonable amount of time, interested parties may petition the FCC for revocation of the authority to regulate

rates. Should the FCC find that the State regulation is no longer necessary to ensure just and reasonable rates, the authority to regulate must be revoked. Id.

C. THE CLEAR INTENT OF CONGRESS WAS TO GRANT THE FCC SOLE JURISDICTION OVER THE RATES AND ENTRY ASSOCIATED WITH CMRS

It is clear from both the legislative history of the OBR and the OBR language itself that it was the intent of Congress that all rate and entry regulation with respect to CMRS be accomplished at the federal level, by the FCC. Indeed, the Conference agreement between the House of Representatives and Senate expressly states:

> It is the intent of the Conferees that the Commission, in considering the scope, duration or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission, so that, consistent with the public interest, similar services are accorded similar regulatory treatment.

House and Senate Conference Report, p. 26.

Clearly, Congress envisioned uniform regulation of providers of similar services throughout the country, such that those carriers may compete on a level playing field. Such uniform regulation is most effectively accomplished by a single regulatory body, the FCC, rather than by subjecting carriers to both federal and State rate regulation.

II. BOTH CONGRESS AND THE FCC HAVE FOUND THE CELLULAR MARKET TO BE SUFFICIENTLY COMPETITIVE SO AS TO WARRANT FORBEARANCE FROM MANY TITLE II PROVISIONS AND PREEMPTION

A. CONGRESS FINDS COMPETITION WARRANTS FORBEARANCE AND PREEMPTION

When Congress enacted the OBR, thereby empowering the FCC to

exercise regulatory authority over CMRS rates, Congress stated that inherent in the FCC's regulatory authority is the power to exercise its discretion with respect to forbearance from certain provisions of Title II. Congress granted the FCC authority to forbear from specific regulation based upon its conclusion that the CMRS marketplace had experienced, and will continue to experience, increased competition. Consequently, forbearance is warranted where the cost associated with complying with certain regulatory burdens exceeds the benefit to be derived from adherence to those requirements. Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, ("NPRM"), 72 RR 2d 147 (1993), para. 164. Thus, Congress has expressed a strong belief the FCC should forbear from regulating certain aspects of the CMRS marketplace.

In accord with these conclusions, Congress preempted State rate and entry regulation in favor of uniform regulation by the FCC. Congress believed that to permit the States to regulate aspects of CMRS service would enable the States to obliterate any semblance of regulatory uniformity which Congress sought to create, and would subject carriers to a frequently conflicting checkerboard of regulatory frameworks. Congress delegated to the FCC the responsibility for determining, with respect to particular services and marketplaces, whether forbearance and preemption are justified.

B. THE FCC FINDS FORBEARANCE WARRANTED AND PREEMPTION JUSTIFIED

In accord with Congress' mandate, the FCC has adopted rules governing the provision of CMRS which adhere to and foster the

policies which Congress promulgated. The FCC's determination that the cellular marketplace is sufficiently competitive was paramount in its consideration of the amount and type of prospective regulatory oversight which should be accorded CMRS providers. With respect to such future regulation, the FCC noted that "open entry and competition often bring greater benefits to customers and society than traditional regulation of a market limited to one or a few carriers." NPRM, para. 51. Consequently, the FCC has forborne from enforcing many provisions within Title II including, inter alia, Section 203 of the Communications Act of 1934, 47 U.S.C. § 151, et seq., which requires carriers to file with the FCC a schedule of charges, terms and conditions associated with interstate service. Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, ("2nd R&O"), 9 FCC Rcd. 1411, para. 175 (1994).[2]/

The FCC's decision to forbear from enforcing specific provisions of Title II was based upon its tentative finding that "the level of competition in the commercial mobile radio services marketplace is sufficient to permit us to forbear from tariff regulation of the rates for CMRS provided to end users." NPRM, para. 62; 2nd R&O, para. 175. The FCC acknowledged that PCS, cellular, paging and specialized mobile service carriers would comprise a large class of carriers which would vie for customers,

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[2]/ The FCC's 2nd R&O did not alter the obligations imposed upon carriers pursuant to the Telephone Operator Consumer Services Improvement Act of 1990. See, In the Matter of Policies and Rules Concerning Operator Service Provider, 6 FCC Rcd. 2744 (1991).

and that none of these competitors would be dominant in the marketplace. NPRM, para. 62. With respect to cellular service in particular, the FCC tentatively found that CMRS "may be sufficiently competitive to permit us to forbear from regulating the rates for these services," and noted that its position was supported by the fact that the vast majority of States have not seen the need to regulate cellular rates. NPRM, para. 63.

In the Second Report and Order, which formally adopted the forbearance policy, the FCC buttressed its tentative conclusions concerning competition in the cellular marketplace, and crystallized its analysis that the cellular marketplace is sufficiently competitive to warrant forbearance from regulation. First, the FCC clarified that its previous classification of cellular carriers as "dominant" was not based upon any evaluation of the competitiveness of the cellular marketplace. 2nd R&O, para. 145. Next, the FCC cited its previous FCC findings that cellular carriers face competition[3]/ and, therefore, the public interest is served by relaxing some policies traditionally applied to non-competitive markets. 2nd R&O, para. 145.

The FCC found that this competition has resulted in decreased costs of cellular service for consumers and a more complex pricing structure tailored to the unique needs of consumers. 2nd R&O, para. 145. With respect to the practical implications of regulation in

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[3]/ For example, competition is fostered by permitting the bundling of cellular service and equipment. Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd. 4028 (1992).

a competitive marketplace, the FCC was cognizant of the fact that tariffing "imposes administrative costs and can be a barrier to competition in some circumstances." 2nd R&O, para. 175. Based upon the foregoing, the FCC found that the cellular marketplace was sufficiently competitive to warrant forbearance from the enforcement of tariff-filing requirements. 2nd R&O, paras. 175, 162.

The FCC further found that forbearance in this instance is in the public interest because tariffs (and the associated notice periods): (1) reduce a carrier's ability to respond quickly to changes in market demand and costs associated with the provision of service, and (2) reduce a carrier's incentive to provide new offerings and price discounting since competitors who are appraised of future business plans have the ability to negate the competitive impact of a carrier's innovative offerings prior to their implementation. 2nd R&O, para. 177. In addition, the FCC found that a market environment free from tariff filing obligations enhances competition in the marketplace, which inevitably increases the benefits derived by consumers. 2nd R&O, para. 177. In contrast, filing and reporting requirements increase costs to carriers -- costs which could be passed onto the consumer in the form of higher rates. 2nd R&O, para. 177. Moreover, the FCC found that tariff notice provisions which provide competitors with access to proposed rate restructuring and future proposed rates may actually encourage artificially high rates and may facilitate tacit collusion between the two facilities-based carriers. 2nd R&O,

para. 177.

Significantly, the FCC considered and dismissed one State's allegations of potential collusion by the two facilities-based carriers in each cellular market. The FCC found collusion unlikely for three reasons: 1) there exist several services which compete with cellular service; 2) cellular carriers face the threat of future competition by, among others, PCS carriers; and 3) as a result of ever-improving technology, cellular carriers must continually improve the quality of their service in order to maintain demand. 2nd R&O, para. 145.

By forbearing the FCC does not intend to abandon the rates and market entry arenas. Rather, the FCC explicitly left in place key statutory safeguards. Cellular carriers remain subject to the obligations imposed upon them as common carriers pursuant to Sections 201 and 202 of the Communications Act, which require that the rates charged for service be just and reasonable and which prohibit unjust or unreasonably discriminatory rates. 2nd R&O, para. 176. The FCC made it clear that it intends to enforce these statutory provisions:

> In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act. Although we will forbear from enforcing our refund and prescription authority, described in Sections 204 and 205, we do not forbear from Sections 206, 207, and 209, so that successful complainants could collect damages.

2d R&O, para. 176.

Moreover, simultaneous with the adoption of its forbearance

policy, the FCC retained for itself, pursuant to Congressional mandate, the authority to ensure that cellular rates would remain just and reasonable, in accord with the public interest. Thus, all criteria required to be satisfied prior to the implementation of a forbearance policy have been fulfilled: 1) retention of statutory requirements contained within Sections 201 and 202 of the Communications Act (and their complementary enforcement provisions, set out in Sections 206, 207, 208 and 209 of that Act) ensure that rates will be just and reasonable; 2) since just and reasonable rates are, by definition, in the public interest, consumers need not be protected from such rates; and 3) forbearance was determined to be in the public interest because decreased regulation will provide cellular carriers with increased flexibility to respond to market conditions and customer demand.

The satisfaction of these criteria necessarily negates the validity of those allegations upon which a State petition for authority to regulate rates must be grounded: such petitions must contain evidence that rates are unjust and unreasonably discriminatory, and that consumers require protection from them. The petition assumes a violation of the Communications Act -- which, even if true, is more appropriately remedied by enforcement of the Communications Act under the regulatory authority statutorily granted to, and retained by, the FCC.

III. NEW YORK'S PETITION TO REGULATE RATES AND ENTRY DOES NOT SATISFY THE DEMANDING REQUIREMENTS OF THE FCC'S RULES

A. STATES SEEKING TO CONTINUE REGULATION OF CMRS RATES AND ENTRY MUST SUBMIT A MARKET-ANALYSIS-INTENSIVE PETITION REQUESTING SUCH AUTHORITY, AND MUST MEET A HIGH BURDEN OF PROOF

In light of the statutory language and Congress' clear intent to create a symmetrical regulatory scheme for the provision of CMRS, see OBR, the FCC's implementation of Sections 3(n) and 332 of the Communications Act, and the economic benefits to be obtained from relaxed regulation, States seeking to continue rate regulation of cellular services must satisfy a heavy burden of proof. Section 20.13 of the FCC's Rules requires a State to demonstrate by empirical, concrete evidence that rates in that State are unjust, unreasonable or discriminatory. The burden of proof must be sufficient to overcome the FCC's finding that the CMRS marketplace is, in fact, competitive and capable of producing just and reasonable rates. See 2nd R&O, paras. 124-154.

In the process of deciding whether to forbear from certain aspects of Title II, the FCC examined the competitive nature of the cellular service marketplace. See Id., paras. 124-213. By ultimately choosing to forbear, the FCC necessarily found that the nationwide cellular marketplace is sufficiently competitive within the meaning of Section 332. Specifically, the FCC found that continued application of certain provisions of Title II is not required because (1) "charges, practices, classifications, or regulations for or in connection with [cellular service] are just and reasonable and are not unjustly or unreasonably

discriminatory;" (2) "[e]nforcement of such provision is not necessary for the protection of consumers;" and (3) "[s]pecifying such provision is consistent with the public interest." 47 U.S.C. §332(c)(1)A)(1)-(3); 2nd R&O, paras. 135-39.

It also follows that by forbearing, the FCC established a presumption of competition--and hence of federal preemption--within the CMRS/cellular markets of the individual States. A State may overcome this presumption only after making the following recommended substantive showing:

> (1) Demonstrative evidence that market conditions in the State for commercial mobile radio services do not adequately protect subscribers to such services from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. Alternatively, a State's petition may include demonstrative evidence showing that market conditions for commercial mobile radio services do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and that a substantial portion of the commercial mobile radio service subscribers in the State or a specified geographic area have no alternatives means of obtaining basic telephone service. This showing may include evidence of the range of basic telephone service alternatives available to consumers in the State.
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> (2) The following is a non-exhaustive list of examples of the types of evidence, information, and analysis that may be considered pertinent to determine conditions and consumer protection by the Commission in reviewing any petition filed by a State under this section:
>
> (i) The number of commercial mobile radio service providers in the State, the types of services offered by commercial mobile radio service providers in the State, and the period of time that these providers have offered service in the State.
>
> (ii) The number of customers of each commercial mobile radio service provider in the State; trends in each provider's customer base during the most recent

annual period or other data covering another reasonable period if annual data is unavailable; and annual revenues and rates of return for each commercial mobile radio service provider.

(iii) Rate information for each commercial mobile radio service provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable.

(iv) An assessment of the extent to which services offered by the commercial mobile radio service providers the State proposes to regulate are substitutable for services offered by other carriers in the State.

(v) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry.

(vi) Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile radio service providers in the State.

(vii) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon commercial mobile radio service subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the State to produce reasonable rates through competitive forces will be considered especially probative.

(viii) Information regarding customer satisfaction or dissatisfaction with services offered by commercial mobile

> radio service providers, including statistics and other information about complaints filed with the State regulatory commission.

47 C.F.R. § 20.13.

For the following reasons, NYPSC's Petition fails to satisfy the FCC's strict standard for continuing rate regulation, and, accordingly, the Petition should be denied.

B. THE STATE OF NEW YORK'S PETITION TO EXTEND RATE AND ENTRY REGULATION CONTAINS INSUFFICIENT EVIDENCE OF A LACK OF COMPETITION IN THE CELLULAR MARKET

Preliminarily, it is important to note what the NYPSC claims and what it does not claim. The NYPSC never explicitly claims that its cellular marketplace is anticompetitive or that rates are unjust or unreasonable or discriminatory.[4] Instead, the State's Petition relies upon speculative grounds to justify continued rate regulation: "State rate regulation, as it is employed in New York, serves as a deterrence to anticompetitive and discriminatory practices." Petition at 3 (emphasis added). Needless to say, the factual showing required by Section 20.13 is nowhere satisfied by this bare claim which is, in reality, irrelevant to the ultimate issue of whether market forces are sufficient to protect CMRS

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[4]/ The NYPSC stated, in an earlier proceeding, "the NYPSC concludes that cellular service is furnished competitively where the market structure is one that has been designed by the FCC to be competitive. Our experience . . . . shows that these carriers do not need to be regulated." NYPSC Proceeding an Motion of Commission to Review Regulatory Policy For Segments of Telecommunications Subject to Competition, Case No. 29469, dated May 16, 1989, at 9 ("Case No. 29469").

customers in the State of New York.[5] To be sure, the desire of NYPSC to perpetuate itself as a rate regulator has no bearing on the Petition's merits.

NYPSC's main claim to justify continuing rate regulation is simply a direct challenge to Congressional policy-making: the duopoly structure of cellular facilities, the State maintains, precludes "full" competition, now or in the future; and without full competition, the cellular services market in New York will always be subject to abusive rates. This basic argument misconstrues Congressional intent and is totally unsupported by factual proof or economic justification.

In the OBR, Congress retained the existing system of licensing two facilities based cellular carriers within each CGSA and placed that cellular system within the broader CMRS regulatory scheme encompassing similar mobile services, such as Private Carrier Paging (PCP) services, Specialized Mobile Radio (SMR), Enhanced Special Mobile Radio (ESMR), and broadband and narrowband personal communications services (PCS). As a result, New York's primary ground to continue rate regulation is not valid. The evidentiary burden of Section 20.13 remains unsatisfied by a general challenge to Congress' decision to maintain a duopoly system of cellular facilities.

Moreover, there is no economic basis for claiming that limiting facilities-based suppliers to two does not produce a

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[5] Section 20.13(a)(1) requires New York to demonstrate that market conditions there "do not adequately protect" cellular subscribers from unjust and unreasonable rates.

competitive market. Theoretical models of the strategic interactions between duopolists predict a broad range of outcomes, from monopolistic to perfectly competitive. See J. Tirole, The Theory of Industrial Organization (Cambridge, MA: The MIT Press, 1988) 225-308.

The NYPSC predicates its entire market power analysis on a faulty definition of the relevant market. The NYPSC would view cellular services in a vacuum, unaffected by developments in comparable technologies and FCC policy that have and continue to create a dynamic marketplace in cellular services. Instead, mobile services must be viewed, practically, as a system of competing technologies. In addition, the FCC's decision to allocate additional spectrum for the provision of wireless services will result in increased numbers of wireless service providers within each CGSA market, reduced spectrum scarcity and, accordingly, increased competition.[6] As one market study found,

> . . . the industry is about to experience a significant increase both in the number of firms that supply mobile communications services and in the amount of spectrum that has been allocated for this purpose. At least three, and perhaps as many as six, new firms will operate in each geographic area, and the amount of spectrum available for the provision of mobile services will more than triple.
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> Moreover, even this understates the amount of additional capacity that will be available to serve subscribers since the new operators will use digital technologies that are more efficient than the analog technologies that have been used by incumbent cellular operators. To this must be added the effect

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[6]/ There are 458 SMR's operating in New York at this time.

> of the introduction of Enhanced Special Mobile Radio (ESMR) in the near term and satellite mobile service somewhat later, both of which will add further to the number of firms providing mobile services and the amount of spectrum devoted to this purpose. By any standard, industry concentration will decline greatly--and limitations on industry growth that have resulted from government-imposed limits on available spectrum will be greatly relaxed.

Stanley M. Besen, Charles River Associates, "Concentration, Competition, and Performance in the Mobile Telecommunications Service Market" ("CR Study"), at 8 (See Attached Exhibit A).

To be sure, the trend in New York, reflecting the national CMRS marketplace, is in the direction of increased competition, a fact NYPSC readily admits: "[T]he declines in revenues per access number and revenues per airtime minute indicate that overall average prices are declining." (Furthermore the NYPSC does not take into account inflation, which would equate to lower prices.) Petition at 8. Further, the market structure in New York is inherently competitive. New York State is divided into 17 CGSAs, including 11 MSAs and 6 RSAs. More importantly, the New York City MSA, with 32 resellers, alone generates 73 percent of all cellular revenues in the State. Competition, therefore, is highly developed. The continued evolution and deployment of new technologies can be expected, with a resulting potential for downward pressure on prices.

The NYPSC also seeks to re-open the issue of how best to promote competition in the cellular services marketplace. NYPSC maintains that "cellular rate regulation in New York is not an

impediment to effective competition and will, in fact, result in more, rather than less, infrastructure investment in this State." Petition at 3. The FCC has acknowledged that regulation impedes infrastructure development and efficient operations. 2nd R&O, para. 19.

Congress envisioned greater competition in the provision of cellular services by less rather than more regulation; by an integrated regulatory approach; and rationalization of the existing system. The FCC in turn concluded, after analysis, that relaxed regulation would best serve the public interest. 2nd R&O, para. 17. Simultaneously, FCC Rules will be vigilantly enforced to prevent any abuse of the public interest by a cellular provider following forbearance. Id., para. 162.

In Section III of its Petition, New York avers four grounds for extending rate regulation. First, because the facilities in three of six MSAs do not have 50-50 market shares, "[t]his data may indicate that one company has a dominant position. . . . " Petition at 9 (emphasis added). Second, "While the complaint rate is low, the absolute number of complaints has increased significantly, by close to 100%. "Third, "the rates for cellular service remain considerably higher than comparable land line telephone services." Petition at 8. And, "the returns of several of the companies are clearly higher than traditional regulated land line companies, and most unregulated high tech companies." Petition at 8.

1. Market share is not an indicator of competition in the marketplace.

New York State's first claim on behalf of continuing rate regulation is that because 1992 market share for all but two of the MSAs, as evidenced by total revenues, was not equally split 50-50, a facilities provider "may" have had a "dominant position and that absent continued oversight could have the incentive and opportunity to engage in anticompetitive pricing." Petition at 9. This argument, however, simply defies a normal market assessment.

In the fluid CMRS marketplace, it is predictable that market share may shift between the two facilities providers as they interact with new market developments. Indeed, New York State's reference to disparate market share, rather than being an indication of less than perfect competition--a theoretical ideal anyway--may in fact reflect active competition in the marketplace. The picture is incomplete, however, because the facilities providers are merely one factor affecting the provision of cellular services. Various other market forces are interacting, and it may be that in the MSAs with other than split revenues, one company is simply more efficient than the other; or that the extent of fixed facilities is not identical across every CGSA.

The NYPSC's "dominant position" argument utterly ignores the nature and effect of market competition. Competition encourages each party to strive for greater market share by providing consumers with, for instance, better service and rates. The effect, as Congress intended, is dynamic. Indisputably, rate regulation can only be justified by the existence of monopoly

power, which does not in any way describe the New York CMRS. Moreover, State regulation can impose burdensome costs which may ultimately harm competition. To illustrate, cellular rates in States that regulate cellular prices are approximately five to sixteen percent higher than rates are free of regulation.[7]

2. The absolute number of customer complaints does not reflect true customer satisfaction since the cellular market has experienced explosive growth.

The NYPSC's second preferred ground, which cites an increase in the absolute number of consumer complaints against cellular "companies," is similarly misleading. By its own account, only about 40 percent of the 146 most recent complaints were rate-related.[8] Petition at 9. If the number of rate-related complaints increased over time--and New York admits such figures are unavailable--so too did the absolute size of the cellular services market. Nationwide, the cellular industry has grown from 100,000 subscribers in 1984, to over 16 million customers by 1993. CR Study, at 5.[9] Conditions in New York mirror the nationwide trend of explosive growth. See Petition. Therefore, New York State's claim that an absolute increase in the number of complaints must be indicative of the existence of anticompetitive forces is at best incomplete and at worst wrong.

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[7]/ See Affidavit of Jerry A. Hausman, United States v. W. Elec. Co., Inc., Civil Action No. 82-0192, at 10 (July 29, 1992).

[8]/ Some of these are billing disputes and may not be rate related.

[9]/ CR Study cites as the source of these figures the Cellular Telecommunications Industry Association's End-of-Year Data Survey.

3. CMRS rates should not be compared to landline telephone service because it is a competitive marketplace.

The NYPSC's main factual claim to support extending rate regulation--that rates for cellular service are "considerably higher than comparable" land line telephone service[10] -- is flawed. The NYPSC's failure to address the fundamental distinction between CMRS and landline telephone service undermines its basic argument.

Viewed in its proper light, CMRS is emerging as a highly dynamic and competitive marketplace.

> Contributing to the increasing number of subscribers and the accompanying increase in the volume of use has been a steady decline in the costs of owing and using cellular telephones. For example, the real, i.e., inflation-adjusted, unweighted average of the lowest published rate for access and 250 minutes of usage during prime time in the ten largest cellular service areas in 1991 was only 62 percent of its 1983 level. [Source cited: Herschel Shosteck Associates, Ltd., Cellular Market Forecasts, Data Flash, September 1992).] Similarly, the average of the lowest real price for the purchase or 150 minutes of airtime in the top 30 markets declined by 27 percent between January 1985 and January 1991. [Source cited: General Accounting Office, Concerns About Competition in the Cellular Telephone Service Industry, GAO/RCED-920-220, 1992, p. 22.]
>
> The same general pattern of decline real prices can be observed for cellular systems owned by GTE. The unweighted average of the lowest real prices for systems in the top 100 MSAs in which Contel Cellular Inc has at least a 90 percent ownership interest declined by

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[10]/ NYPSC does not say what rates it is using for comparison (residential, business, intra-state toll). Clearly cellular rates may be less than intra-state toll rates for similar coverage.